No. 99-483

IN THE

Supreme Court of the United States

RESTAURANT ROW ASSOCIATES and
THE AFTERDECK, INC. d/b/a THEE DOLLHOUSE,

Petitioners,

v.

HORRY COUNTY, a Political Subdivision
of the State of South Carolina,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

JOHN P. HENRY
Counsel of Record
EMMA RUTH BRITTAIN
THE THOMPSON LAW FIRM, P.A.
Attorneys for the Respondent
1318 Third Avenue
Post Office Box 1533
Conway, South Carolina 29526
(843) 248-5741

155729

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Should certiorari be denied because Ordinance 92-89 is a proper time, place and manner restriction and Horry County properly relied upon studies of other localities concerning adverse secondary effects in enacting the adult entertainment ordinance?

2. Is amortization of nonconforming adult entertainment uses constitutionally permissible?

3. Should certiorari be denied because Petitioners failed to appeal the Trial Court's finding of constitutionality of the Ordinance as applied to them and failed to appeal the issue of amortization?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices v

Statement of the Case 1

Reasons for Denying the Writ 4

I. Ordinance 92-89 Is A Proper Time, Place And Manner Restriction And The County's Reliance On Studies Of Other Localities As To Adverse Secondary Effects Is Consistent With The Established Caselaw Of This Court. 4

II. Amortization Of Nonconforming Adult Entertainment Uses Is Constitutionally Permissible. 10

III. Petitioners Failed To Appeal The Trial Court's Finding Of Constitutionality Of Ordinance 92-89 As Applied To Them And Failed To Appeal Any Issue As To Amortization. 13

Conclusion 14

TABLE OF CITED AUTHORITIES

Cases: *Page*

Barnes v. Glenn Theater, Inc., 501 U.S. 560, 111 S. Ct. 2556, 115 L. Ed. 2d 504 (1991) 6, 7, 9

Centaur v. Richland County, 301 S.C. 374, 392 S.E.2d 165 (S.C. Sup. Ct. 1990) 8, 10

Collins v. City of Spartanburg, 281 S.C. 212, 314 S.E.2d 332 (Sup. Ct. 1984) 10

Hart Bookstores, Inc. v. Edmisten, 612 F.2d. 821 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980) 11

Northend Cinema v. City of Seattle, 90 Wash.2d 709, 585 P.2d 1160 (1978) 11

Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1985) 4, 6, 7, 9

State v. Joyner, 286 N.C. 366, 211 S.E.2d 320 (M.C. 1975) 10

23 Washington Street, Inc. v. City of Hagerstown, M.D., 972 F.2d 342 (4th Cir. 1992) 8, 11, 12

Village of Euclid v. Amber Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926) 10

Cited Authorities

Page

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 11, 12

Young v. American Mini Theatres, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) 7, 8, 12

Statute:

S.C. Code Ann. § 6-7-710 (Law Co-op. 1993) 8

S.C. Code Ann. § 6-7-740 (1976) 3, 5

United States Constitution:

First Amendment 7

TABLE OF APPENDICES

Page

Appendix A — South Carolina Ordinance Number 92-89 ..... 1a

Appendix B — South Carolina Code Ann. § 6-7-740 (1976) 7a

STATEMENT OF THE CASE

Horry County (hereinafter the "County"), a body politic and corporate of the State of South Carolina, adopted a zoning ordinance in 1987. Petitioners Restaurant Row Associates and the Afterdeck, Inc. d/b/a Thee Dollhouse (hereinafter "Thee DollHouse") commenced its business as an adult entertainment establishment in March, 1988. On September 30, 1989, Horry County adopted Ordinance 92-89, establishing adult entertainment zoning regulations. Under Ordinance 92-89, businesses existing at the time of enactment that were in violation of the Ordinance were granted a six year amortization period in which to recoup their investment and seek other locations should they desire to continue as an adult use.

On January 6, 1994, the Horry County Zoning Administrative wrote Thee DollHouse reminding it that it was a nonconforming use and warning that it must cease all adult entertainment operations at its current location by January 1, 1995. On August 16, 1994, Thee DollHouse filed three variance appeal applications with the Board of Zoning Adjustments and Appeals (hereinafter the "Board") challenging the Zoning Administrator's decision. Application No. 94-08-009 requested a variance from Section 526.2c of the Zoning Ordinance requiring a 500 foot separation between adult entertainment establishments and residentially-zoned areas. This particular application is the one in controversy in the instant litigation.[1]

---

1. Application No. 94-08-007 challenged the County's definition of "adult cabaret" contained in Ordinance No. 92-89 as not applicable to Thee DollHouse. The County at no time, however, applied this definition to Thee DollHouse, but relied upon its

(Cont'd)

The Board made factual findings and concluded as a matter of law that Thee DollHouse did not meet the statutory requirements for a variance and denied the requested relief (A 33-37). The other two applications for relief were also denied.

On November 16, 1994, Thee DollHouse initiated litigation appealing the denial of its request for a variance from Ordinance No. 92-89 by the Board. Petitioners specifically applied for a variance from a provision of the Ordinance that prohibits the location of an adult entertainment establishment within 500 feet of a residential district, because of it's location within 350 feet of a residentially-zoned district. Thee DollHouse asserted numerous causes of action in its complaint relating to the constitutionality, validity, applicability and statutory construction of Ordinance 92-89.

On March 3, 1994, the trial court judge issued an Order finding Ordinance No. 92-89 constitutional as applied to Thee DollHouse (A-30). The trial court overruled the Board's denial of the variance, however, on the grounds that the Board's decision was arbitrary and capricious because the Atlantic Intracoastal Waterway, in the Court's opinion, formed a natural barrier separating the residential district from the Petitioners' place of business and there were currently no residences located within the residentially-zoned areas.

(Cont'd)
classification as an "adult entertainment establishment," as to which there is no dispute. Application No. 94-08-008 challenged the Zoning Administrator's determination that amendments contained in Ordinance No. 26-90 did not repeal the amortization period established in Ordinance No. 92-89 for nonconforming adult entertainment establishments.

On June 9, 1997, the South Carolina Court Appeals issued a per curium Order upholding the Board's decision on the grounds that Petitioners had failed to prove an unnecessary hardship under South Carolina Code Ann. § 6-7-740 (1976), thereby reversing the lower court's finding that Thee DollHouse was entitled to a variance (A 15-26). Thee DollHouse failed to appeal the circuit court's ruling that Ordinance No. 92-89 is constitutional as applied to it.

Contrary to the assertion in Petitioners' Statement of the Case, the Court of Appeals did not find there are no residential uses "contemplated" for the golf course (Petition, p. 4). The Court of Appeals merely found that the golf course "contains no residences" (A-17). The record before the Court of Appeals included testimony of one of the owners of the adjoining residential area in which he specifically testified that residential development was contemplated in the future.

Petitioners filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on October 3, 1997, which was granted on July 2, 1998. The South Carolina Supreme Court issued its opinion on May 17, 1999, upholding the Board's denial of the variance, finding that Thee DollHouse failed to establish the requisite element of unnecessary hardship required for a variance (A 1-14). The South Carolina Supreme Court also found that the Ordinance was a proper time, place and a manner restriction which did not unreasonably limit alternative avenues of communication. The Court observed that Thee DollHouse does not contest the fact that there are areas within the County Zoning Ordinance which would allow it to operate as an adult entertainment business.

Thee DollHouse petitioned the South Carolina Supreme Court for Rehearing. The petition was denied on June 23, 1999 (A 27-28).

REASONS FOR DENYING THE WRIT

I.

ORDINANCE 92-89 IS A PROPER TIME, PLACE AND MANNER RESTRICTION AND THE COUNTY'S RELIANCE ON STUDIES OF OTHER LOCALITIES AS TO ADVERSE SECONDARY EFFECTS IS CONSISTENT WITH THE ESTABLISHED CASELAW OF THIS COURT.

Ordinance 92-89 is a zoning measure designed to combat the undesirable adverse secondary effects of adult entertainment businesses and, as such, is properly reviewed under the standard applicable to content-neutral time, place and manner regulations. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1985). The South Carolina Supreme Court properly applied this Court's analysis in *Renton* that " 'content-neutral' time, place and manner restrictions are acceptable as long as they are designed to serve a substantial government interest and do not unreasonably limit the alternative avenues of communication." 475 U.S. at 46. The instant Ordinance is similar to that considered by this Court in *Renton* in that it does not ban adult entertainment establishments, but merely provides that adult entertainment establishments not be located within a specified distance of residential zones. Accordingly, the South Carolina Supreme Court properly considered the Ordinance as a form of time, place and manner regulation.

Petitioners argue that certiorari should be granted because the County was obligated to prove specific adverse secondary effects from the operation of Petitioners' business before it could apply zoning Ordinance 92-89 to it. Petitioners do not dispute that their business is properly classified as an "adult entertainment establishment" within the meaning of Ordinance 92-89. Petitioners' assertion that proof of specific adverse secondary effects caused by its business must be shown, however, is without merit and is contrary to the established caselaw of this Court.

Petitioners' contention that the courts below "specifically acknowledged that Thee DollHouse does not cause the 'adverse secondary effects' allegedly associated with sexually oriented Adult Uses such as adult cabarets" is without support as to the appellate court opinions (Petition for Writ of Certiorari, p. 7). There is no such finding by the South Carolina Supreme Court or the Court of Appeals. These courts merely acknowledged that this is Petitioners' position.

The instant proceeding arose as the result of Petitioners' application for a variance from the County's zoning law pursuant to State law, S.C. Code Ann. § 6-7-740 (1976) (A-7a). As such, Petitioners had the burden of proving the requisite elements for a variance as established by South Carolina law. Horry County made no study of adverse secondary effects as a part of Petitioners' variance application nor was it required to do so. This Court has held that adverse secondary effects peculiar to the particular business or property involved are not a requisite showing. *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 49. The existence, or lack thereof, of adverse secondary effects, is not an undisputed issue as Petitioners contend. In fact, at the variance hearing, the Board accepted testimony from a local real estate developer of property within the vicinity of Thee DollHouse who has held a real estate license since 1979. The developer testified without equivocation that the presence of Thee DollHouse adversely impaired property values in the area.

Relying on *Renton* and *Barnes v. Glenn Theater, Inc.*, 501 U.S. 560, 111 S. Ct. 2556, 115 L. Ed. 2d 504 (1991), the South Carolina Supreme Court properly held that adult businesses "cannot exclude themselves from legitimate zoning regulation by providing expert testimony that they do not currently produce negative secondary effects" and that preventing or minimizing future problems was a legitimate basis for Ordinance 92-89. In *Renton*, this Court reversed the Ninth Circuit Court of Appeals' ruling applying the argument Petitioners propound herein that there must be studies specifically relating to the particular problems or needs of the governmental entity. This Court, rejecting the argument of particularized finding, held that "the Court of Appeals imposed on the City an unnecessarily rigid burden of proof." 475 U.S. at 49. Recognizing that Renton relied heavily on the experiences and studies of the City of Seattle pertaining to prevention of secondary effects, this Court held:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the "detailed findings" summarized in the Washington Supreme Court's Northend Cinema opinion, in enacting its adult theater Zoning Ordinance. The First Amendment does not require a city, before enacting such an Ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonable believed to be relevant to the problem that the city addresses.

Id. at 931. In *Renton*, this Court recognized that there is a valid and substantial governmental "interest in attempting to preserve the quality of urban life . . . that must be accorded

high respect." *Id.* at 49 (*quoting Young v. American Mini Theatres*, 427 U.S. 50, 71, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976)). Similarly, in his concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456 (1991) Justice Souter observed: ". . . I do not believe that a State is required affirmatively to undertake to litigate this issue [adverse secondary effects] repeatedly in every case." *Id.* at 584-585.

Horry County Ordinance 92-89 specifically provides in its preamble that "the County Council is aware of studies done by other cities and counties throughout the United States of the problems which result from the uncontrolled spread of adult nightclubs;" that "the adult nightclubs in Horry County have begun to concentrate together in small areas causing an increase in criminal activity, deterioration of property values, visual blight and a general decline in the quality of life in the tone of commerce in those areas;" and that the Council "has determined that there are certain land uses with which adult nightclubs are incompatible, such as schools, churches, and residential districts." (A 1a-2a). In particular, the County considered studies from cities such as Houston, Phoenix, Indianapolis, Seattle, Austin, Oklahoma, Los Angeles and Richland County, South Carolina, as well as other places. As this Court clearly articulated in *Renton*, the County was not required under the First Amendment, to conduct new studies so long as the studies relied upon were reasonably believed to be relevant to the problem it was addressing. *Renton*, 106 S. Ct. at 931.

The County's adoption and application of Ordinance 92-89 was held by the trial court to be constitutional. In this regard, the trial court specifically found:

1. Horry County Ordinance No. 92-89 is constitutional.

> Reasonable regulations of the time, place and manner are protected speech, where those regulations are necessary to further significant government interests, are permitted by the First Amendment. Young v. American Mini Theatres, Inc., 427, U.S. 50, 64 (1976); Centaur, Inc. v. Richland Co., Inc., __ S.C. __, 392 S.E.2d 165, 168 (S.C. Sup. Ct. 1990). As per S.C. Code Ann. §6-7-710 (Law. Co-op. 1993), I find Horry County Ordinance No. 92-89 was made with reasonable consideration of the character of the area and its peculiar suitability for particular uses and with a view to promoting desirable living conditions and the sustained stability of neighborhoods, protecting property against blight and depreciation, securing economy in governmental expenditures, conserving the value of land and buildings, and encouraging the most appropriate use of land and buildings and structures. Horry County Ordinance No. 92-89 is constitutional as applied to Thee DollHouse.

(A-30).

The trial court's holding of constitutionality was not appealed to the Court of Appeals by Petitioners and therefore was not properly preserved for appellate review, as argued below.

Petitioners' argument as to particularized findings of adverse secondary effects as to its particular business has been rejected by the Fourth Circuit Court of Appeals. *See 23 Washington Street, Inc. v. City of Hagerstown, M.D.*, 972 F.2d 342 (4th Cir. 1992) (City of Hagerstown, Maryland,

not required to conduct its own study of adverse secondary effects but could rely on reasonably relevant studies conducted by other municipalities).

Petitioners rely upon a variety of cases involving regulatory takings, blanket bans on speech and advertising rights, commercial speech regulations, and forms of suppression of protected speech that are inapposite to the instant matter in Section 1 of its Petition. The instant action is governed by *Renton* and *Barnes*, however, and Petitioner has failed to effectively distinguish these cases.

In summary, this Court's ruling in *Renton* is dispositive of the issue herein. The South Carolina Supreme Court properly held that adverse secondary effects may be reasonably presumed by the governmental entity based on studies of localities and particularized findings are not required. Citing State statutory authority, the South Carolina Supreme Court observed that the purpose of zoning is to enable governmental entities to prevent and minimize future foreseeable problems as well as current conditions. Petitioners' argument is not only without basis under this Court's existing caselaw, but would prevent the use of zoning to address future problems if such an individualized requirement is imposed. Because the South Carolina Supreme Court's decision is consistent with the decisions of this Court, there are no compelling reasons for certiorari to be granted and Petitioners' request should be denied.

II.

AMORTIZATION OF NONCONFORMING ADULT ENTERTAINMENT USES IS CONSTITUTIONALLY PERMISSIBLE.

Ordinance 92-89's six year amortization period for nonconforming adult entertainment establishments is a valid and constitutionally permissible exercise of the County's police power. Moreover, Petitioners failed to properly preserve this issue for review as further discussed below.

This Court has recognized that general zoning ordinances are a proper exercise of the police power. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). The use of reasonable amortization provisions to eliminate nonconforming uses is recognized as a constitutionally valid exercise of a state's police power. *See State v. Joyner*, 286 N.C. 366, 211 S.E.2d 320 (N.C. 1975) (upholding amortization period of three years for nonconforming uses and citing cases upholding one- two- and three- year time limitations). Similarly, in *Centaur v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (S.C. Sup. Ct. 1990) and *Collins v. City of Spartanburg*, 281 S.C. 212, 314 S.E.2d 332 (Sup. Ct. 1984), the South Carolina Supreme Court specifically acknowledged that zoning ordinances with amortization provisions are lawful exercises of zoning power.[2] Accordingly, Petitioners' reliance on Pennsylvania caselaws and nonzoning cases is misplaced.

---

2. The instant Ordinance was patterned after the Richland County Ordinance upheld against constitutional challenge by the South Carolina Supreme Court in *Centaur v. Richmond County*, 301 S.C. 374, 392 S.E.2d 165 (S.C. Sup. Ct. 1990).

Ordinance 92-89 contains a six year amortization period. Much shorter amortization periods affecting adult entertainment establishments have withstood constitutional challenge in the federal courts. *See Northend Cinema v. City of Seattle*, 90 Wash.2d 709, 585 P.2d at 1160 (three month amortization for adult theatre that permitted nonadult theatre use thereafter upheld); *Hart Bookstores, Inc. v. Edmisten*, 612 F.2d. 821 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980) (six month period before effective date of adult establishment ordinance upheld is sufficient); *23 Washington Street, Inc. v. City of Hagerstown, Md.*, 972 F.2d. 342 (4th Cir. 1992) (city ordinance containing two year amortization provision for nonconforming adult business upheld) (unpublished opinion).

In *23 Washington Street, Inc., supra*, the Fourth Circuit, rejecting the argument that the two existing adult bookstores affected by the ordinance should have been grandfathered, held:

> "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative" [Ward v. Rock Against Racism, 491 U.S. 781, 800]. To the extent either of the rejected alternatives would have permitted the unchanged operation of the existing adult bookstores to continue downtown, it would have severely undercut the purpose of the ordinance to reduce the secondary effects of adult businesses in downtown Hagerstown. Rather than require the

> bookstores to change their operations, Hagerstown merely required them to move, after an adequate two-year period in which to find new locations. . . .Since strict scrutiny is not required for content, neutral time, place or manner restrictions, see Ward, 491 U.S. at 798-99 n.6, we will not second guess Hagerstown's reasonable choice between adequate alternatives.

Petitioners' reliance on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), for its position that the County cannot require a nonconforming adult entertainment establishment to amortize its nonconforming use is misplaced. The context of the Court's statement that the *Young* ordinance "does not affect the operation of existing establishments but only the location of new ones" is made within the context of the Court's observation that "the situation would be quite different if the Ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 72, Footnote 35. In the instant action, there is no proof in the record that Ordinance No. 92-89 has any effect of suppressing or greatly restricting access to lawful speech activities. In fact, as the South Carolina Supreme Court observed, Petitioners acknowledge there are other areas within the County within which they could lawfully operate. Accordingly, the County's use of a six-year amortization period to require Petitioners to cease their nonconforming use is a valid exercise of the County's police power and the request for certiorari on the basis of this issue should be denied.

III.

PETITIONERS FAILED TO APPEAL THE TRIAL COURT'S FINDING OF CONSTITUTIONALITY OF ORDINANCE 92-89 AS APPLIED TO THEM AND FAILED TO APPEAL ANY ISSUE AS TO AMORTIZATION.

As set forth above, the trial court specifically found that Horry County Ordinance 92-89 is constitutional as applied to Petitioners (A-30). Petitioners failed to appeal this finding of constitutionality. Because Petitioners failed to appeal the trial court's ruling that Ordinance No. 92-89 was constitutionally applied, its argument that the Ordinance has been unconstitutionally applied has not been properly preserved for review.

Petitioners have not asserted as a basis for relief, before any of the courts below, its position that the amortization of a nonconforming use is unconstitutional. Accordingly, this issue has also not been properly preserved for review.

CONCLUSION

Based on the above, it is respectfully submitted that the Court, in its discretion, should deny the Petition for Writ of Certiorari because the South Carolina Supreme Court's decision is consistent with the decisions of this Court pertaining to content neutral, time, place and manner regulations that affect adult entertainment establishments and the amortization of such nonconforming uses is constitutionally permissible. Additionally, these arguments have not been properly preserved for review.

For the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

JOHN P. HENRY
Counsel of Record
EMMA RUTH BRITTAIN
THE THOMPSON LAW FIRM, P.A.
Attorneys for the Respondent
1318 Third Avenue
Post Office Box 1533
Conway, South Carolina 29526
(843) 248-5741

APPENDIX

APPENDIX A — SOUTH CAROLINA ORDINANCE NUMBER 92-89

ORDINANCE NUMBER *92-89*

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

ADULT ENTERTAINMENT ORDINANCE

For the County of Horry, regulating the location and operations of businesses featuring live nude or semi-nude entertainment; providing a licensing requirement for those businesses; providing distance separation requirements from those businesses and certain other uses; providing for the amortization of non-conforming uses; providing regulations and restrictions for the external appearance and advertising; and providing for enforcement.

WHEREAS, the County Council of Horry County is authorized pursuant to the Constitution and General Laws of the State of South Carolina, and more specifically Section 4-9-30, et. seq. of the Code of Laws of South Carolina for 1976, as amended, to enact such Ordinances as shall appear necessary and proper for the security, general welfare, and convenience of the County or for preserving health, peace, order and government therein and to protect property located within its boundaries and its citizens; and

WHEREAS, the County Council has become aware of the rapid proliferation of "adult nightclubs" in the County, wherein nude or semi-nude dancing is performed as entertainment; and

Appendix A

WHEREAS, there have been adult nightclubs in the County for some time, but not in the same number as recently; and

WHEREAS, the County Council is aware of studies done by other cities and counties throughout the United States of the problems which result from the uncontrolled spread of adult nightclubs, particularly when those businesses are concentrated together; and

WHEREAS, the adult nightclubs in Horry County have begun to concentrate together in small areas, causing an increase in criminal activity, deterioration of property values, visual blight and a general decline in the quality of life and the tone of commerce in those areas; and

WHEREAS, the County Council has determined that there are certain land uses with which adult nightclubs are incompatible, such as schools, churches and residential districts; and

WHEREAS, some adult nightclubs have begun using offensive advertising, blatant sexual language, garish color schemes, and have failed to maintain their properties in a neat, clean, safe, attractive manner, and as a result of which have caused visual blight and deterioration of the commercial areas in the vicinity of such businesses; and

WHEREAS, the signs and exterior portions of sexually oriented commercial enterprises, adult bookstores, adult movie theatres and massage establishments can be detrimental to the mental health of minors viewing such signs and exterior portions; and

Appendix A

WHEREAS, the signs and exterior portions of sexually oriented commercial enterprises, adult bookstores, adult movie theatres and massage establishments can be detrimental to the mental health of minors viewing such signs and exterior portions; and

WHEREAS, it is not the intention of the County Council to restrict the right to free expression, but only to enact an ordinance to prevent the unwanted and harmful secondary effects which occur when the adult entertainment establishments proliferate without control, particularly when they concentrate in relatively small areas; and

WHEREAS, the County Council believe it is necessary to eliminate the adverse secondary effects which have already resulted from the concentration of some adult nightclubs in Horry County through amortization, requiring all non-conforming uses to come into conformity within a specified period of time.

WHEREAS, this Ordinance shall amend and supplement to the Horry County Zoning Ordinance; and

WHEREAS, the County Council has a legitimate interest in preserving the quality of life, community aesthetics, property values and adherence to law and order, while respecting the legitimate exercise of free expression,

NOW THEREFORE BE IT ORDAINED in County Council duly assembled as follows:

Appendix A

526. *Adult Entertainment Establishments.*

Adult uses shall be allowed as conditional uses in the following zones: Highway Commercial, Limited Industrial, and Heavy Industrial.

526.1 *Classification.*

Adult Entertainment establishments include but are not limited to: cabarets, bookstores, theaters, video stores, peep shows, adult model studios, sexual encounter centers, escort services and motels, as defined herein; and any other establishment which contains activities characterized by the performance, depiction or description of "specified sexual activities", or "specified anatomical areas".

* * *

C. *Location.* Adult entertainment establishments shall not be located closer than:

1. 500 feet from the following residential zoning districts: R-1, R-2, R-4, R-7 and their corresponding MR classifications; GR; RR; RC and MHP.

2. 1,000 feet from any house of worship, day care center, public or private elementary or secondary education school, public park, public library, cemetery, or any motion picture establishment which shows G or PG

rated movies to the general public on a regular basis.

3. 2,000 feet from any other adult use, provided that this shall not apply to any establishment or cabaret that does not provide adult entertainment more than 12 times per calendar year.

4. Measurements of distance separation shall be in a straight line from the closest points of the buildings in which the adult uses are located.

* * *

I. *Uses Declared Non-Conformimg.*

1. Any adult establishment in lawful operation on September 30, 1989, that is in violation of paragraphs B and C above shall be deemed a non-conforming use. If two or more establishments are within 2,000 feet of one another but otherwise in a permissible location, the business which was first established and continually operating at a particular location will be considered a conforming use; the later-established businesses are non-conforming.

2. An adult business lawfully operating as a conforming use is not rendered a non-

conforming use by the subsequent location, of any use listed in Paragraph C-2, within one-thousand (1,000) feet of the adult business. This provision does not apply when an application for a use permit is submitted after a permit has expired or has been revoked. H.

J. *Amortization.* The right to maintain a legal non-conforming adult entertainment establishment shall terminate in accordance with the following schedule:

Amount of Capital Investment* as of the Effective Date, of this Ordinance[1]	Date Before Which Use Shall Terminate
0 to 5,000	January 1, 1991
5,001 to 8,000	January 1, 1992
8,001 to 15,000	January 1, 1993
15,001 to 22,000	January 1, 1994
22,001 or more	January 1, 1995

* * * *

---

* NOTE: The term "capital investment," as used above, is defined to mean the initial outlay by the owner or operator of the use to establish the business as of the date of the enactment of the ordinance, exclusive of the fair market value of the structure in which the use is located.

1. This ordinance is to take effect on September 30, 1989.

APPENDIX B — SOUTH CAROLINA CODE ANN. § 6-7-740 (1976)

The board of appeals or board of adjustment shall have the following powers:

* * *

(2) To authorize upon appeal in specific cases a variance from the terms of the ordinance or resolution as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the ordinance or resolution will, in an individual case, result in unnecessary hardship, so that the spirit of the ordinance or resolution shall be observed, public safety and welfare secured, and substantial justice done. Such variance may be granted in such individual case of unnecessary hardship upon a finding by the board of appeals that:

(a) There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, or topography, and

(b) The application of the ordinance or resolution of this particular piece of property would create an unnecessary hardship, and

(c) Such conditions are peculiar to the particular piece of property involved, and

Appendix B

(d) Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the ordinance or resolution or the comprehensive plan, *provided, however*, that no variance may be granted for a use of land or building or structure that is prohibited in a given district by ordinance or resolution.

* * * *